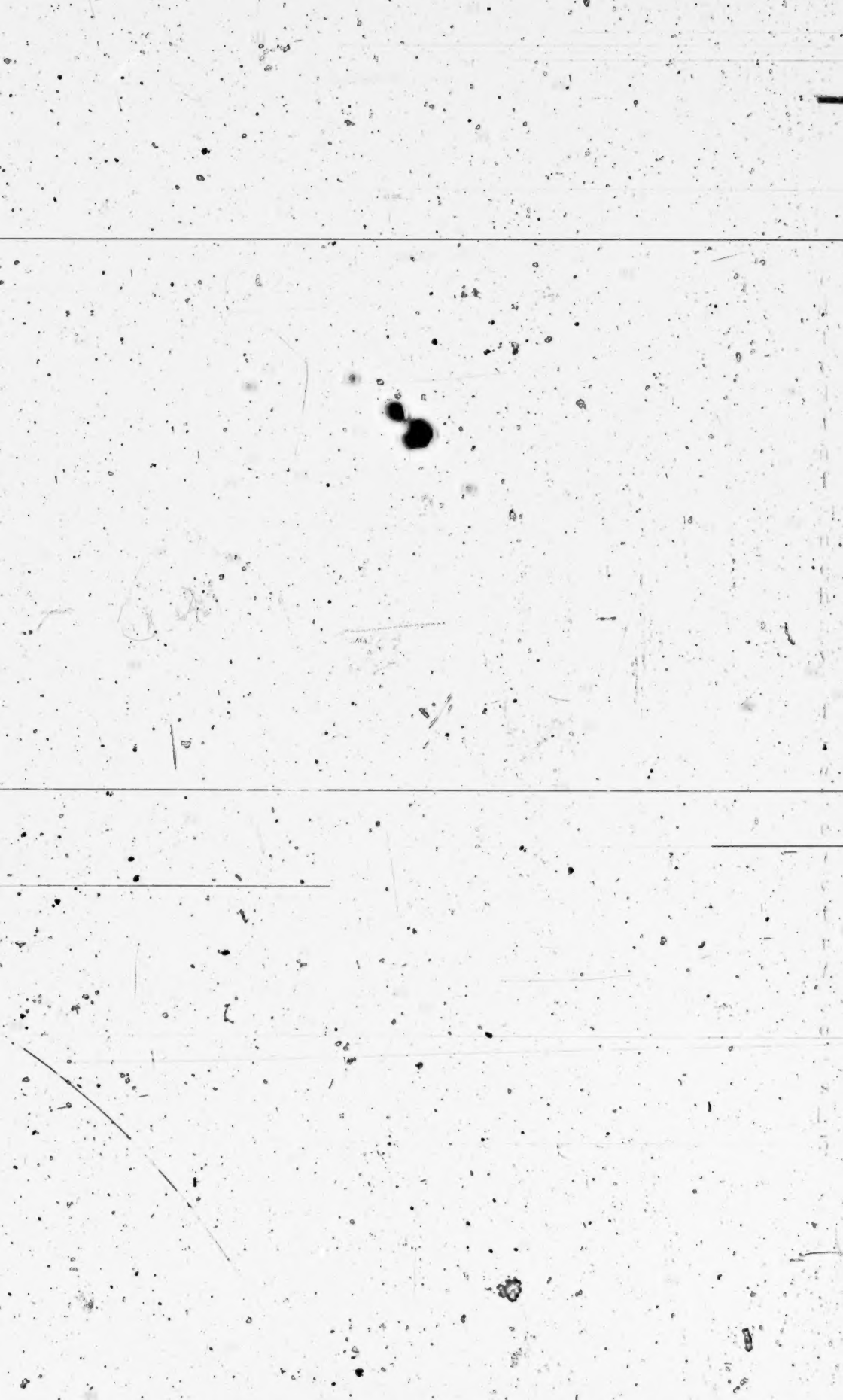

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 98.

RAILROAD RETIREMENT BOARD, SUCCESSOR OF RAILWAY & STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS & STATION EMPLOYEES, AND GEORGE M. HARRISON,

Petitioners,

vs.

DUQUESNE WAREHOUSE COMPANY,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

No. 102.

DUQUESNE WAREHOUSE COMPANY,

Petitioner,

vs.

RAILROAD RETIREMENT BOARD, SUCCESSOR OF RAILWAY CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENT

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OCTOBER 15, 1949.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1945.

No. 95.

Railroad Retirement Board, Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express & Station Employes, and George M. Harrison, Petitioners,

v.

Duquesne Warehouse Company, Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

No. 103.

Duquesne Warehouse Company, Petitioner,

v.

Railroad Retirement Board and Brotherhood of Railway Clerks, Freight Handlers, Express and Station Employes, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

BRIEF FOR DUQUESNE WAREHOUSE COMPANY, RESPONDENT IN NO. 95, AND PETITIONER IN NO. 103.

PRELIMINARY STATEMENT.

In the submission of these cases to the Railroad Retirement Board the record in No. 95 was stipulated as the record in No. 103 (No. 103, R. 27-32). It results that the issues here presented have been considered and determined by the Retirement Board and the lower courts in both cases on the same record. And in granting certiorari, this Court directed that the cases be consolidated for argument (No. 95, R. 329; No. 103, R. 88). Hence, this brief is here presented for the respondent in the first case and for the petitioner in the second. And since the record of first instance is that in No. 95, the argument will be directed more particularly to that case.

OPINIONS BELOW.

In No. 95—The opinion of the Circuit Court of Appeals, Second Circuit, was rendered on March 12, 1945, and is reported 148 F. (2d) 473, Judges Chase and Hutcheson, Judge Frank dissenting. This affirmed the judgment of the United States District Court, Southern District of New York—opinion rendered by Judge Goddard and reported 56 F. Supp. 87—which in turn reversed the decision of the Railroad Retirement Board rendered February 11, 1943, holding Duquesne Warehouse Company (hereinafter referred to as Duquesne) to be an employer within the meaning of Section 1 (a) of the Railroad Retirement Act.

In No. 103—The opinion of the United States Court of Appeals for the District of Columbia was rendered on May 14, 1945, Justices Groner, Miller and Arnold, and is reported 149 F. (2d) 507. This affirmed the decision of the Railroad Retirement Board holding Duquesne to be an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act, and reversed the judgment of the District Court of the United States for the District of Columbia rendered March 2[illegible] 1944—opinion of Bailey, Justice, not reported—which had reversed the decision of the Board.

BASIS FOR JURISDICTION.

The judgment of the United States Court of Appeals for the District of Columbia sought to be reviewed by Duquesne in No. 103 was entered on June 19, 1944. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code as amended (43 Stat. 938; 28 U. S. C. A., Sec. 347), and Rule 38 of the Rules of this Court.

STATUTES INVOLVED.

In No. 95 the action was brought pursuant to Section 11 of the Railroad Retirement Act of 1937, Act of June 24, 1937 (50 Stat. 307); as amended (54 Stat. 264, 785-6; 54 Stat. 1100; 56 Stat. 209).

In No. 103 the action was brought pursuant to Section 5 (c) of the Railroad Unemployment Insurance Act, Act of June 25, 1938 (52 Stat. 1094); as amended (53 Stat. 845-8; 54 Stat. 785-6, 1094-1101; 56 Stat. 210-11). In neither case do the amendments have any bearing on the issues here presented.

The material part of the two statutes is the same. That from the Retirement Act is this:

PART I.

That the Act of August 29, 1935, entitled "An Act to establish a retirement system for employees of carriers subject to the Interstate Commerce Act, and for other purposes"; be, and it is hereby amended to read as follows:

Definitions.

Section 1. For the purposes of this Act—

(a) The term "employer" means any carrier (as defined in subsection (m) of this section), *and any company which is directly or indirectly owned or controlled by one or more such carriers or under*

common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however*, That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, but shall not exclude any part of the general steam-railroad system of transportation now or hereafter operated by any other motive power. The Interstate Commerce Commission is hereby authorized and directed upon request of the Board, or upon complaint of any party interested, to determine after hearing whether any line operated by electric power falls within the terms of this proviso. The term "employer" shall also include railroad associations, traffic associations, tariff bureaus, demurrage bureaus, weighing and inspection bureaus, collection agencies and other associations, bureaus, agencies, or organizations controlled and maintained wholly or principally by two or more employers as hereinbefore defined and engaged in the performance of services in connection with or incidental to railroad transportation; and railway labor organizations, national in scope, which have been or may be organized in accordance with the provisions of the Railway Labor Act, as amended, and their State and National legislative committees and their general committees and their insurance departments and their local lodges and divisions, established pursuant to the constitution and bylaws of such organizations.

* * * * * * *

(m) The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act. (Italics supplied.)

Pertinent also are these provisions from the Interstate Commerce Act, Part I (49 U. S. Code):

Sec. 1. (3)(a) The term "common carrier" as used in this part shall include all pipe-line companies; express companies; sleeping-car companies; and all persons, natural or artificial, engaged in such transportation as aforesaid as common carriers for hire: Wherever the word "carrier" is used in this part it shall be held to mean "common carrier". The term "railroad" as used in this part shall include all bridges, car floats, lighters, and ferries used by or operated in connection with any railroad, and also all the road in use by any common carrier operating a railroad, whether owned or operated under a contract, agreement, or lease, and also all switches, spurs, tracks, terminals, and terminal facilities of every kind used or necessary in the transportation of the persons or property designated herein, including all freight depots, yards, and grounds, used or necessary in the transportation or delivery of any such property. *The term "transportation" as used in this part shall include locomotives, cars, and other vehicles, vessels, and all instrumentalities and facilities of shipment or carriage, irrespective of ownership or of any contract, express or implied, for the use thereof, and all services in connection with the receipt, delivery, elevation, and transfer in transit, ventilation, refrigeration or icing, storage, and handling of property transported.* The term "person" as used in this part includes an individual, firm, copartnership, corporation, company, association, or joint-stock association; and includes a trustee, receiver, assignee, or personal representative thereof. (Italics supplied.)

QUESTION PRESENTED.

The question at issue is whether Duquesne, a corporation of the Commonwealth of Pennsylvania which has conducted for over 39 years and now conducts an ordinary commercial warehouse business at Pittsburgh, Pa., is an

employer within the meaning of Section 1 (a) of the Railroad Retirement and Unemployment Insurance Acts. And this in turn depends on whether the warehouses which Duquesne has operated and now operates, or the services which it has performed and is performing are noncasual services "in connection with the transportation of * * * property by railroad, or the receipt, delivery, * * * transfer in transit, * * * storage, or handling of property transported by railroad", as those terms are used in the two statutes in question. Duquesne performs no elevation, refrigeration or icing services.

STATEMENT.

This is a coverage case arising under the Railroad Retirement and Unemployment Insurance Acts, and involves the definition of the term "employer" as found in those statutes. There are three acts where this definition of employer is identical—the Railroad Retirement Act of 1937, the Carriers Taxing Act of 1937 (50 Stat. 435 and now Chapter 9, Subchapter B, (Secs. 1500-1537) Internal Revenue Code), and the Railroad Unemployment Insurance Act. The Retirement Act is the statute pursuant to which annuities and pensions to railroad workers are paid. The Taxing Act is the statute under which the money is collected with which to make those payments. The Unemployment Insurance Act provides benefits in cases of unemployment, for which no such contribution is made by the employe as is the case under the Carriers Taxing Act. Likewise there is almost an identical definition in the Railway Labor Act (48 Stat. 1185) Sec. 1, which is this:

"The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any com-

pany which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *." (Sec. 1, first.)

Initially the Railroad Retirement Board, which is the administering agent under the Retirement and Unemployment Insurance Acts, instituted a proceeding under the Retirement Act to determine whether Duquesne is an employer under that act. The Retirement Board, consisting of three members, so held—one member dissenting (R. 45-57).* In the United States District Court for the Southern District of New York, Duquesne, pursuant to Section 11 of the Retirement Act, brought an action to set aside this decision of the Retirement Board. Upon request and consent, the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express & Station Employes, and George M. Harrison, President of said Brotherhood, were permitted to intervene as parties defendant. Duquesne moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Judgment went for Duquesne. The Retirement Board and the Brotherhood appealed. The Second Circuit Court of Appeals affirmed, one Judge dissenting.

After the determination of the Retirement Act case by the District Judge in the United States District Court for the Southern District of New York, the Retirement Board initiated a similar proceeding under the Railroad Unemployment Insurance Act. By stipulation, the record in the Retirement Act case was made the record in the Unemployment Insurance Act case. The Retirement Board held Duquesne to be an employer within the meaning of

* Refers to record pages in No. 95. Record pages in No. 103 are so noted.

Section 1 (a) of the Unemployment Insurance Act, one member again dissenting. Pursuant to Section 5 of the Unemployment Insurance Act, Duquesne brought an action in the District Court of the United States for the District of Columbia to reverse the final determination of the Retirement Board. Duquesne prevailed. The opinion of Judge Bailey who decided the case is not reported. The Retirement Board and the Brotherhood appealed. The United States Circuit Court of Appeals for the District of Columbia reversed the lower court, Mr. Justice Arnold writing the opinion.

The net result was that in cases involving identical issues and determined on the same record, the two Courts of Appeals rendered conflicting decisions. In the Retirement Act case, No. 95, the Retirement Board and the Brotherhood petitioned this Court for certiorari. Petitioner in the Unemployment Insurance Act case, No. 103, did likewise. This Court granted certiorari in both cases, and ordered that they be consolidated for argument.

The facts before the Retirement Board were not developed by witnesses through question and answer. They were furnished to the Board in answers to two questionnaires (R. 58-59, 103-7), and in two specific statements of fact furnished by petitioner, the latter expressly accepted by the Retirement Board as the facts in the case (R. 108-114, 131-9). In addition, there are two affidavits and their attachments which round out the factual part of the case (178-232). Hence, the cases came before the lower courts and are presented here not on conflicting statements but on facts which are not challenged. Under those conditions the case presents solely a question of law.

Other cases in which this coverage question has been litigated are *Ocean S.S. Co. of Savannah* v. *Allen, Collector*, 36 F. Supp. 851, affirmed 123 F. (2d) 469 (C. C. A. 5, 1941); *Baltimore Steam Packet Co.* v. *Magruder, Collector*, 50 F. Supp. 639, affirmed 144 F. (2d) 130 (C. C. A. 4, 1944), and *Interstate Transit Lines* v. *United States*,

56 F. Supp. 332 (D. C. Nebraska, Omaha Div.). In each case the attempt was made to hold the carrier under the employer coverage provision here involved. In each case the attempt failed. In the case of the Interstate Transit Lines no appeal was taken from the determination of the District Court. Nor was certiorari asked in the first two cases.

SPECIFICATIONS OF ERRORS TO BE URGED IN NO. 103.

The United States Court of Appeals for the District of Columbia acted under a misapprehension of the meaning of the statutes and erred in approving the construction of the two statutes placed upon them by the Railroad Retirement Board, and more particularly in holding—

1. That the services performed by Duquesne are "in connection with" the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad (No. 103, R. 83).

2. That the services performed by Duquesne are services "habitually carried on by railroads as part of their business" (No. 103, R. 83).

3. That the act applies to services rendered in connection with property after railroad transportation has ended or before it has begun, as held by the Railroad Retirement Board (R. 28).

4. That the legislative history of the statute fails to show that the services performed by Duquesne were not intended to be covered by the Railroad Unemployment Insurance Act.

5. That Duquesne is an employer within the meaning of Section 1 (a) of the Railroad Unemployment Insurance Act.

THE FACTS.

The principal statement of the facts, altogether unchallenged, is found at R., pp. 132-139. The exhibits there mentioned appear at R., pp. 168-172. The facts are these:

Duquesne is a corporation of the Commonwealth of Pennsylvania, incorporated August 1, 1906. A copy of its charter is found at pp. 67-8 of the Record. Its only power is that of "conducting a storage and warehouse business." It issues warehouse receipts pursuant to the Warehouse Receipts Act of Pennsylvania—Act of 11 March 1909, P. L. 19. Copies appear in the Record (168-9). It has long been classed in the trade as a warehouseman conducting a commercial warehouse business. During the life of the National Industrial Recovery Act (48 Stat. 195) it was a subscriber to the Code of Fair Competition for the Merchandise Warehousing Trade, and was assigned a specific certificate number under this Code (R. 185, 209, 221). Its stock is owned by The Pennsylvania Railroad Company, hereinafter called Pennsylvania (R. 133).

Its operations are confined to two warehouses, one at East Liberty and the other at Pittsburgh. Both warehouses are owned by Pennsylvania and leased to Duquesne, with the exception of a portion of each building on the ground floor which is retained by Pennsylvania and used and officially designated by it as its freight agency. The railroad company maintains an agency force at each. These stations are fully equipped with tracks and other facilities for the receipt, delivery and handling of inbound freight and outbound, both carlot and less. The operations of each are entirely separate from the operations of the warehouse. Each warehouse has a siding where delivery is made by the railroad company in carlots to the warehouse company. The owner unloads. Duquesne performs the work and charges the owner. On

outbound carload shipments the owner loads on the same siding. The warehouse company does the work and charges the owner. On inbound deliveries and outbound shipments of less than carload freight such delivery and receipt are made and given by the railroad agency at the warehouse. Inbound Duquesne takes the freight from the railroad platform, and outbound delivers it at the railroad platform. It receipts to Pennsylvania inbound, and takes a railroad bill of lading outbound (R. 133-4).

At East Liberty the only commodity handled by Duquesne is sugar in carlots, although the agency of the railroad company at that point is open for the receipt and delivery of all freight, carload and less. The sugar is in packages. It comes into Pittsburgh by rail transportation, originating at the seaboard—New York, Philadelphia and Baltimore. It moves under regular bills of lading of the rail carrier. It is consigned to the owner, a sugar company, care of the Duquesne Warehouse Company. The warehouse company is the consignee. A typical form of such a covering bill of lading appears R. 170. Delivery is made to the warehouse company in placing the car on the siding of the warehouse company. The railroad has then completed its transportation. The freight money is prepaid. The warehouse is used by the owner of the sugar as a distributing point. The packages are assembled in number and size to meet the requirements of the owner's trade. Outbound shipments are made by the owner and in its name. The sugar that went in is the sugar which goes out but assembled differently. A typical bill of lading covering such a movement appears R. 171. Inbound and outbound the sugar is carried by the railroad at carload rates. In the case of inbound shipments the owner unloads the sugar, and on outbound shipments loads the same, the work of unloading and loading being performed by Duquesne for the owner. This loading and unloading by the owner is required by Rule 27, Section 1 of the tariff which governs as to rail trans-

portation, being Consolidated Freight Classification No. 13, and reading as follows, there being no exception as provided in the rule:

> "Owners are required to load into or on cars freight for forwarding by rail carriers, and to unload from cars freight received by rail carriers, carried at C. L. ratings or rates, except where the tariff of the carrier at point of origin or destination or stopover station (as the case may be) provides for the loading or unloading of C. L. freight by carrier" (R. 134-5).

While the freight is in the warehouse it is under the exclusive control and direction of the owner. The responsibility of Duquesne in the custody of the sugar is that of a warehouseman. There is no responsibility of the railroad company. All services accorded the sugar, such as loading, unloading, storing, ventilating, drying, moistening, packaging and assembling, are performed by Duquesne at the direction of the owner, and charges for such services are billed by Duquesne against the owner and paid by it (R. 135).

The appropriate tariff of the railroad company carries a transit privilege on sugar in carloads at East Liberty. That is, sugar in carloads transported by the railroad company to consignees at East Liberty may be there delivered to the consignees at the local rates, and if and when subsequently shipped out via the same railroad is entitled to be charged the through rate from first point of shipment to ultimate destination. For instance, assume that the shipment initially moves from New York to East Liberty, is delivered to consignee, is kept in storage there by the consignee for a period of three months, then either the identical sugar or like tonnage is shipped by the consignee to Chicago. Assume further, that the rate from New York to Chicago per 100 pounds

is 90¢, while the rate from New York to Pittsburgh is 50¢, and the rate from Pittsburgh to Chicago is 50¢. On the movement from New York to Pittsburgh the local rate of 50¢ is charged and paid. But on the outbound movement from Pittsburgh, because of the transit privilege, the through rate from New York to Chicago applies, and the shipper pays 40¢ additional only. There, of course, are certain policing rules, primarily to make sure that no more tonnage goes out than comes in. The lower rate is the advantage, and is the chief factor in this transit privilege. The tariff covering the privilege is D. R. R. I. C. C. 100, the pertinent part of which is found at p. 172 of the record. The master tariff of the railroad company carrying the rules governing I. C. C. 100 contains this particular one:

> "While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner" (R. 135-6).

The transit privilege of the railroad company is not particular to any one consignee. It is restricted to commodities and locations, but is open to all receivers of those commodities at those points. For instance, transit on sugar is accorded also at Chicago, Detroit, Fort Wayne and Indianapolis; on lumber at Cincinnati, Fort Wayne and Toledo; on dairy products at Cincinnati, Cleveland, Detroit and Indianapolis; on grain at Chicago, Cincinnati, Pittsburgh and St. Louis; and on iron and steel at Ambridge, Pa., Chicago and Logansport, Ind. And at East Liberty the transit privilege is accorded canned food stuffs in addition to sugar (R. 136).

At its other warehouse in Pittsburgh proper, Duquesne also conducts a commercial warehouse business but more diversified as to commodities. The business comes to the warehouse either by rail or by truck, chiefly.

by rail. Such trucking is not local. When coming by rail in carlots and less, the shipments are consigned to the owners care of the Duquesne Warehouse Company as at East Liberty. In the case of carlots, the cars are placed on the siding of the warehouse, and delivery is then and there made to the consignee. Unloading is done by the owner as required by the tariff, the goods being carried at carload rates. In the case of less than carlot shipments the freight is unloaded by the railroad from cars to the platform of the agency, and there delivery is made to the warehouse company by the railroad and appropriate delivery receipt taken. In case of outbound carlot shipments the reverse is the case, the owner loading the shipments and taking from the railroad bills of lading. In less than carload shipments Duquesne delivers the property to the agent of the railroad company at the station, and the railroad company issues its bill of lading, loads the shipment into the car and moves it out. About 40% of less than carlot business moves out by truck" (R. 136-7).

Duquesne sublets parts of the building to tenants who conduct their business there. They are chiefly manufacturing concerns or representatives of manufacturers. Duquesne has nothing to do with any shipments delivered to them or shipped by them. The railroad company treats them the same as any other patrons (R. 137).

Duquesne also at this warehouse receives from the Pennsylvania "freight which has been damaged and refused. At that time Duquesne takes entire possession of the freight, reconditions it, and sells it at private sale. In case the freight proves to be worthless, Duquesne disposes of it. For these services Duquesne charges the railroad company 10% of the gross proceeds of sale, with deductions for any necessary expenses in reconditioning and handling, and remits the balance to the railroad company. This is after the freight has finished its transportation and is turned over to Duquesne for disposal by the

railroad company in a separate and independent transaction." In the handling of that freight under either of the two contracts with Pennsylvania Duquesne has never made delivery to the consignee or owner. Nor has Duquesne under any direction of Pennsylvania ever disposed of any freight which has become so worthless as to become unsalable (R. 137, 178).

Employees of Duquense are on its payroll only, and are paid solely out of its funds. They are hired by Duquesne and discharged by it. They are under no continuing or other authority from Pennsylvania to supervise and direct the manner of rendition of their services, and never have been. They come under the direction of the Superintendent of Duquesne, who has full and unrestricted authority to conduct a commercial warehouse business in accordance with the charter of the company. These employees are not accorded free transportation by Pennsylvania; they are not entitled to become members of The Pennsylvania Railroad Voluntary Relief Department, or of The Pennsylvania Railroad Employes Provident and Loan Association. Membership in the Relief Department is limited to employees or former employees of the railroad company; that in the Provident and Loan Association to employees. They have never been regarded by Pennsylvania as its employees nor by Duquesne as other than employees of that company. Duquesne has paid and is paying taxes under the Federal Social Security Act, Titles VIII and IX, and also makes contributions under the State Unemployment Compensation Law. And it collects from the wages of its employees the tax imposed by Title VIII of the Federal Social Security Act (R. 137-8).

All freight delivered by Pennsylvania to Duquesne or received by Pennsylvania from Duquesne is carried by Pennsylvania at tariff rates which are subject to the Consolidated Freight Classification, Section 1 of Rule 23 of which is this:

"Carriers' agents must not act as agents of shippers or consignees for the assembling or distribution of C. L. or L. C. L. freight" (R. 138).

Duquesne files no tariffs with the Interstate Commerce Commission or any state commission. Nor is it a party to any tariff of any railroad company or other common carrier (R. 138).

In the valuation of property of The Pennsylvania Railroad Company, as required by Section 19 (a) of the Interstate Commerce Act, Part I, by the Interstate Commerce Commission—22. Valuation Reports—these warehouses are not classified as carrier properties (R. 139).

SUMMARY OF ARGUMENT.

1. The words of the statute require that the facilities operated and the services performed by the owned company or affiliate must be "in connection with" property transported by railroad. As will appear in the following pages of this brief, the other defining words such as receipt, delivery, transfer in transit, storage and handling are but descriptive of the words "transported by railroad." Duquesne operates two warehouses in commercial storage. They are not railroad facilities—*Growers Marketing Co.* v. *Pere Marquette R. Co.*, 248 I. C. C. 215. It operates no equipment. Its services are wholly in connection with those warehouses. So the only question here at issue is whether the services which Duquesne performs are "in connection with" property transported by railroad. It is the position of Duquesne that this means while the property is being transported in railroad service, and not before such transportation has begun or after it has ended.

2. The facts of record are not in dispute. They came to the Retirement Board in questionnaires from the Retirement Board answered by Duquesne, in statements of

facts submitted by Duquesne to the Retirement Board, and in affidavits likewise submitted to the Retirement Board by Duquesne. Hence, the case presents solely questions of law.

3. The text of the Unemployment Insurance Act as to coverage is precisely that in the Retirement Act; and the history of the Unemployment Act shows that the coverage in the one was intended to be that in the other.

4. The Railroad Retirement Act was the embodiment of an agreement between management and labor after the decision of this Court in *Railroad Retirement Board* v. *Alton R. Co.*, 295 U. S. 330 (1935); and should not properly be given a broader scope than was intended by the parties and understood and adopted by the Congress.

5. The two acts were understood and intended to cover the railroad industry and not the warehouse industry, the one having always been separate and distinct from the other.

6. The words "in connection with" as used in the two acts have no application to the services rendered by Duquesne, and this has been ruled by the Retirement Board itself; and such words or similar ones have been given the same construction by the courts in cases relating to transportation.

7. On the undisputed facts the services performed by Duquesne are prior to the commencement or subsequent to the termination of railroad transportation and therefore not within the coverage of the acts.

8. There are set forth answers to some particular points raised by the Retirement Board in its opinion.

ARGUMENT.

I. The Question Here Presented Is Whether The Services Which Duquesne Performs Are "In Connection With Property Transported By Railroad."

To bring Duquesne within the terms of the act there are two separate requirements. The first is that it must be directly or indirectly owned or controlled by an express company, sleeping-car company or carrier by railroad subject to Part I of the Interstate Commerce Act. The stock of Duquesne is owned by Pennsylvania, a carrier by railroad subject to Part I of the Interstate Commerce Act. The other requirement is that Duquesne must perform services "in connection with" the transportation of property by railroad. To meet one requirement is not enough. Both must be present. *Baltimore Steam Packet Co. v. Magruder, Collector, supra.* And it is important to note that while the ownership may be indirect, the performance of services must be direct.

The position of the Retirement Board is that under the facts in this case coverage extends not only to services in connection with the transportation of the property while in the possession of the railroad company, but even before such possession and afterwards (R. 28). If the position of the Retirement Board were carried to its ultimate conclusion it would mean this. A wholesale merchant at Pittsburgh receives via Pennsylvania a carload of flour in barrels. He takes delivery and stores it in his own warehouse. Subsequently he finds that he is running short of laundry bar soap. He has no place of his own in which to store it. But his use for it is more immediate than of flour, so he decides to store the flour with Duquesne. Suppose this is six months after delivery by Pennsylvania to the merchant. Nevertheless, the fact that the flour has once been transported by Pennsylvania would render Duquesne in the transaction subject to the Retirement and Unemployment Insurance

Acts. It would take more compelling language than here found to require this Court to reach result of this kind.

Duquesne asserts the contrary. It is not disputed that each of its warehouses has its own siding, that delivery is made by Pennsylvania when the cars are placed on those sidings, and that railroad transportation is there ended (R. 134). The same is true as to outbound freight loaded in carlots, railroad transportation not attaching until the car is loaded and the bill of lading issued (R. 22). Our position is expressed in this extract from the opinion of Judge Parker in the case of *Baltimore Steam Packet Co.* v. *Magruder, Collector, supra:*

> "* * * If additional light were needed as to the meaning of the phrase, 'service in connection with', as used with transportation by railroad in the statute, it is furnished by the succeeding words 'or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.' *Noscitur a sociis.* Clearly what was intended was to cover subsidiary carporations of railroads that render *services while the transportation by railroad is in progress or services that the railroads are under obligation to render for the rates that they charge.* It would be giving a forced and unnatural construction to the language to hold it applicable to water transportation merely because such transportation precedes or follows transportation by rail in the course of interstate movement. * * *" (p. 133). (Italics supplied.)

The word "transported" is a passive participle equally applicable to the present as to the past tense. And it will appear from the following pages of this brief that both the courts and the Interstate Commerce Commission have always applied the word "transported" as meaning while the property is in the course of railroad transportation.

II. Since The Facts Are Not In Dispute, The Issue Is One Of Law For Determination By The Court.

A. The Case is One of Coverage.

The construction placed upon the statute by the Retirement Board is this:

> "In light of the general purpose of the Railroad Retirement Act and accepted doctrines of statutory construction, the Board has construed the carrier affiliate coverage provision as denoting services which are an integral part of, or are closely related to, the rail transportation system of a carrier and as including within its coverage (1) carrier affiliates engaged in activities which are themselves railroad transportation or which are rendered in connection with goods in the process of transportation, such as loading and unloading railroad cars, receipt, delivery, transfer in transit, and other handling of property transported by railroads; and also (2) carrier affiliates engaged in activities which enable a railroad to perform its rail transportation, such as maintenance and repair of way and equipment, and *activities which enable a railroad to operate its rail system more successfully* and to improve its services to the public, such as auxiliary bus transportation, dining facilities, and incidental warehousing services" (R. 31-32). (Emphasis supplied.)

This divides into (1) services performed while the goods are in the process of railroad transportation, and the loading and unloading of cars is given as an example; and (2) services which are said to enable a railroad to operate its rail system more successfully and to improve its services to the public, such as warehousing services. As to (1), the loading and unloading of cars is rail transportation when performed by the rail carrier or by others for it as part of its transportation service, but it is not

service in rail transportation when performed by a consignee or owner, or by another at the instance of consignee or owner. Under the governing tariff here (R. 135) Pennsylvania could not unload and can not unload without violating its tariff (R. 135). *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 510.

The other element of the Board's construction that the coverage includes services of an affiliate which enable a railroad to operate its rail system more successfully and to improve its services to the public is so exceedingly broad as not to merit further discussion. In so far as we are aware, no authoritative body other than the Retirement Board has approved any such expansion. Such an extension would certainly place the Railroad Retirement Account in much greater actuarial deficiency than exists today. This insolvency is covered more fully at p. 34 of this brief.

In No. 103 the Court of Appeals below approved of this construction by the Retirement Board. And it went further in holding that the operations under consideration here are those habitually carried on by railroads as part of their transportation service (No. 103, R. 83). In support of its position it relied upon *Baltimore & Ohio Railroad Co.* v. *United States*, 305 U. S. 507, 516-17. That case resulted from the decisions of the Interstate Commerce Commission as found in 198 I. C. C. 134, 216 I. C. C. 291, and 220 I. C. C. 102. What the Commission in those cases condemned was certain practices of certain carriers in the New York territory which come within the definition of commercial storage. And in doing so it is important to note here that the Commission defined "transportation" under the Interstate Commerce Act as follows:

"The term 'transportation' as used in section 1 (3) of the act includes the receipt, delivery, elevation, and transfer in transit, ventilation, refrigera-

tion or icing, storage and handling of property transported. Under section 1 (4) it is made the duty of every common carrier subject to the act engaged in the transportation of property to provide and furnish such transportation upon reasonable request therefor. While storage of property is clearly within the transportation service which carriers are obligated to furnish, their duty under these provisions extends only to that storage which is necessarily incidental to transporting such property. To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal. *State* v. *Southern Pac. Co.*, 52 La. Ann. 1822; 28 So., 372; *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169. * * *"

Propriety of Operating Practices—New York Warehousing, 198 I. C. C. 134, 194-5.

This Court in *United States* v. *American Sheet & Tin Plate Co.*, 301 U. S. 402, has held that "The Commission is clearly empowered to determine what is embraced within the service of transportation and what lies outside that service" (p. 408).

In the record before the Court there is nothing to the effect that the services of Duquesne are those condemned in the three I. C. C. cases. In fact Duquesne is doing exactly what the Commission commended in the three above cases. Hence, in deciding this case the Retirement Board acted under a misapprehension as to the meaning of the statute. The Court of Appeals below did likewise, and in addition misconstrued the decision of this Court in *Baltimore and Ohio Railroad Co.* v. *United States, supra.* And because of a similar situation, this Court has lately reversed this same Appellate Court in this language:

"Since the Court of Appeals considered irrelevant the jurisdictional test which we find to be imposed by Congress, the inquiry on review has not proceeded under a correct rule of law and it follows that the judgment of the Court of Appeals must be reversed."

Connecticut L. & P. Co. v. *Federal Power Commission*, ... U. S. ... (Jan. 3, 1945).

B. The Facts are not in Dispute.

The Board chose to handle this case by a submission of facts and not at oral hearing. First, a questionnaire was submitted by the Retirement Board to Duquesne and answered by it (R. 58, 99). The wording of the questionnaire was not sufficiently clear to be fully understood, and so the answers could not accurately cover the inquiries. The District Court in No. 95 thought so also (R. 287). Meanwhile an entirely new form of questionnaire had been devised by the Retirement Board. This Duquesne answered and filed with the Board by way of substitution with an accompanying letter (R. 103). Then followed a statement of facts in more detailed form submitted by Duquesne and accepted by the Board (R. 108-110). And finally, in order that the record might be quite complete, a statement of facts, not differing from the previous one but much more extended, was filed with the Board and accepted by it under the terms of a letter reading as follows:

"In response to your letter of the 3rd ult. in this proceeding, time subsequently extended in your favor of the 22nd ult., I beg to say that enclosed herewith you will find statement of facts and memorandum of law in support of the position of the warehouse com-

pany that it is not an employer within the terms of the Railroad Retirement Act. The facts appearing in the statement of facts can be substantiated by competent proof. It is accordingly requested that this statement of facts be made a part of the record in this proceeding. If the Board, however, is not willing to accept this statement of facts as the facts in the proceeding, then it is requested that before any ruling be made by the Board or order entered by the Board which may be adverse to the position taken by the warehouse company, a hearing be had to the end that a complete record in stenographic form may be had in the proceeding." (R. 130-131.)

Two affidavits of consequence with their exhibits (R. 178-232) complete the undisputed facts, which as such present a question of law for determination by the Court. *Farmer* v. *Commissioner of Internal Revenue*, 126 F. (2d) 542, 543 (C. C. A. 10, 1942); *Nelson* v. *Montgomery Ward & Co.*, 312 U. S. 373, 376; *Baltimore & Ohio Railroad Co.* v. *United States, supra*, at p. 515.

We do not except to all the findings of the Board. The underscored portions appearing in the Appendix are those which are here challenged. It will immediately be seen that those findings are arbitrary because grossly contrary to the undisputed facts. At best they are not more than erroneous conclusions covered in fact apparel. As such they come within the well settled rule that "Where facts found are mere conclusions from undisputed testimony, they are given no greater weight than findings of law." *Commercial Motors Mortgage Corp.* v. *Waters*, 280 Pa. 177, 180-1, 124 Atl. 327; *Fidelity Trust Co.* v. *Union National Bank of Pittsburgh*, 313 Pa. 467, 471, 169 Atl. 209, certiorari denied 291 U. S. 680; *Fidelity-Philadelphia*

Trust Co. v. Lehigh Valley Coal Co., 294 Pa. 47, 54, 143 Atl. 474; *Barrows v. Fuller*, 253 Mass. 79, 148 N. E. 374, 375.

III. The Text Of The Unemployment And Retirement Acts As To Coverage Is Identical; And The History Of The Unemployment Act Shows That The Coverage Of The Former Was Intended To Be The Same As That Of The Latter.

The Unemployment Act was drafted by the labor representatives themselves.* The same bill was before both the House and Senate Committees, H. R. 10127 and S. 3772, Seventy-fifth Congress, Third Session, May 26 and June 3, 1938. The following extracts from the testimony shows that the coverage was intended to be precisely that under the Railroad Retirement Act:

"1. *Coverage.*—Identical with that of Railroad Retirement Act of 1937, viz, interstate railroads, certain of their operating subsidiaries, sleeping-car and express companies, traffic and similar associations

* "About 2 years ago the Railway Labor Executives' Association began to work on this type of protection against the increasing hazard of unemployment, and discussed the problem with the Association of American Railroads. We had a bill drafted along the general lines of State unemployment compensation laws. It was probably a good bill but we couldn't understand it. It was too complex. Under it, as under the present State laws, no worker would ever really understand his rights. So we appointed a subcommittee of Railway Labor Executives' Association to study the subject primarily with a view to simplification. We had several different bills drafted one after another. They were studied by our subcommittee and the chiefs of the railway labor organizations, until finally we arrived at the present bill, which we believe to be the simplest and soundest bill for unemployment insurance ever introduced into any legislature in this country."

(Cashen, President, Switchmen's Union and Chairman Unemployment Insurance Committee, Railway Labor Executives Association. House Hearings, pp. 21-2, on H. R. 10127. Same statement, same witness, Senate Hearings, p. 18, on S. 3772. Seventy-fifth Congress, Third Session, May 26 and June 3, 1938.)

maintained by the railroads, and railroad labor organizations."

(Cashen, President, Switchmen's Union, and Chairman Unemployment Insurance Committee, Railway Labor Executives Association. House Hearings, p. 16. Same statement Senate Hearings, p. 22.)

"In the first place we provide that the coverage of this act shall be identical with the coverage of the Railroad Retirement Act; that is to say, *it applies, speaking briefly and in summary, only to men who in some capacity or other are engaged in the operation of the country's railroad system.* In the second place, it applies in the contribution or taxing side to identically the same tax base as is carried in the carriers' taxing act." (Emphasis supplied.)

(Hay, Counsel for Railway Labor Executives Association, House Hearings, pp. 29-30. Similar statement Senate Hearings, p. 27.)

This is from the Senate Committee report on S. 3772:

"EXPLANATION OF THE BILL

Section 1. Definitions

* * * * * * *

"As stated above, it is the purpose that the proposed act have the same coverage of employers and employees as the Railroad Retirement Act. For this purpose, the definitions of the terms 'employer,' 'carrier,' 'company,' and 'employee representative' (subsecs. (a), (b), (c), (e) are the same as in the Railroad Retirement Act. * * *"

(Senate Report, p. 3. Same statement House Report on H. R. 10127, p. 3.)

IV. The Retirement Act Is The Embodiment Of An Agreement Between Management And Labor With Respect To Pensions And Annuities For Railroad Workers; It Was Sanctioned By Congress Through Legislative Enactment; And Should Not Be Extended Beyond The Clear Intent Of The Parties As Understood And Adopted By The Congress.*

The development of the history of the present Railroad Retirement Act really begins with the Transportation Act, 1920,† Act of February 28, 1920, Title III, c. 91 (41 Stat. 456). That Act established a plan for the settlement of disputes between carriers and their employes and subordinate officials. In 1926 the Railway Labor Act (44 Stat. 577) was passed, which repealed Title III of the Transportation Act. The Railway Labor Act was amended substantially in 1934 (48 Stat. 1185) giving the definition of "employer" as we now have it.‡ It is practically the same as the definition in the Retirement and Unemployment Insurance Acts. And while the Railway Labor Act as thus amended has been in effect for over eleven years, no one has ever claimed that Duquesne is subject to it.

In the passage of the Railway Labor Act of 1934 through the Congress, the bill before the Senate Committee

* At this point it is not inappropriate to bring to the attention of the Court that there are now pending before congressional committees two identical bills which would by legislative enactment so amend the two acts involved in these cases as to extend the coverage not only to the extent here sought by the Retirement Board but very much beyond. One member of the Retirement Board is not in accord. The bill in the Senate before the Interstate Commerce Committee is numbered S. 293, and that in the House before the Interstate and Foreign Commerce Committee, H. R. 1362—paragraphs (2), (4) and (5) of Section 1 (a), pages 2-4. Hearings have been concluded before the full House Committee, and also before a subcommittee of the Senate Committee. Both bills are being vigorously opposed by carriers, warehousemen and other.

† The Erdman Act, of June 1, 1938 (30 Stat. 424), and the Newlands Act, of July 15, 1913 (38 Stat. 103), are not material to this discussion.

‡ Except that by a further amendment of 13 August 1940 (54 Stat. 785) coal miners were excluded. This amendment was also carried into the Retirement and Unemployment Insurance Acts.

was S. 3266 (73rd Congress, 2nd Session). In so far as material here, the definition of the term "carrier" was this:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, any company operating any equipment or facilities or furnishing any service included within the definition of the term 'railroad' and 'transportation' as defined in the Interstate Commerce Act, * * *." (Section 1, First.)

Mr. Eastman, then Federal Co-ordinator of Transportation, was the sponsor of the bill. Speaking to the scope of the measure, he said this:

> "In the paragraph of section 1 marked 'First', there is a change in the present definition of the term 'carrier.' This change is intended to bring within the scope of the act operations which form an integral part of railroad transportation, but which are performed by companies which are not now subject to the Railway Labor Act. The most important illustration is found in the refrigerator-car companies, which own refrigerator cars operated by the railroads and perform certain functions connected with refrigeration service. Another illustration is found in the companies to which railroads have on occasion contracted out their maintenance work on equipment and even on way and structions. The thought is that concerns which function in this way as *an integral part of the railroad transportation system* should be subject to the same duties and obligations with respect to labor controversies as the railroads themselves and as the express and sleeping-car companies. This object is attained by including in the definition of 'carrier' any company 'operating any equipment or facilities or furnishing any service included within the definition of the terms "railroad" and "trans-

portation" as defined in the Interstate Commerce Act. Perhaps a better way can be found of accomplishing the desired result, but it was thought that this language would serve the purpose" (pp. 10-11). (Emphasis supplied.)

On a subsequent day, 18 April 1934, and before the same committee, his testimony was this:

"MR. EASTMAN:—I shall discuss, first, the amendments to S. 3266 which have been proposed by the railroads.

"Section 1, paragraph first: The railroads wish to strike out the words 'any company' in line 10 of page 1. This amendment would confine the bill to the employees of express companies, sleeping-car companies, and railroads. It would eliminate companies, like refrigerator-car companies, which operate facilities or furnish service forming a part of railroad transportation. Most of the illustrations given by Mr. Clement to support his objections to the words 'any company' relate to construction work. The language in the bill would not cover outside companies engaged in such work for the railroads, as I read it. He is right in believing that it would cover trucking companies performing terminal service for the railroads. However, he approves of the wording of the present act, and that includes 'other transportation facilities used by or operated in connection with any such carrier by railroads'. It is plainly broad enough to cover terminal trucking.

"THE CHAIRMAN:—As I recall it, he claimed that it would affect their building of bridges and affect their contracts for all kinds of work. Is that your understanding of the definition?

"MR. EASTMAN:—Well, as I read the definition of the bill, as I have said here, I do not think it would cover such construction work. However, I am about to propose an amendment.

"While I believe that the railroad objections are largely without basis, the chairman has made a valid criticism of the definition of 'carrier' now in the bill, because it requires reference to another act. I can also see difficulties in bringing in trucking operations and certain other operations performed for railroads by outside companies, because of possible conflicts with N.R.A. codes. It is difficult to know just where to draw the lines. I am inclined to believe that for the present it would be well *not to go beyond carriers and their subsidiaries engaged in transportation.* So changed, the definition would read:

> 'the term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad.'

"That, I may say, is some of the language in the Interstate Commerce Act" (pp. 145-6). (Emphasis supplied.)

In the House the companion bill was H. R. 9689. Mr. Eastman, again testifying on 22 May 1934, said this:

> "COMMISSIONER EASTMAN:—Well, that is the bill that I will talk about this morning. This bill does not depart from the general principles of the present Railway Labor Act, but instead is designed to reinforce those principles and provide for their more effective application. It seeks not to overturn but to perfect what has been done.

"I call attention in the first place to the fact that section 1 contains definitions. The present Railway Labor Act contains a definition at the outset of the term 'carrier', which has been subject to some doubt. I do not think it has ever been fully decided just what is covered by the definition of 'carrier' in the act as it now stands. In this bill, H. R. 9689, the definition provides that the term 'carrier' shall include any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act; and then does further and includes

> any company which is directly or indirectly owned or controlled by, or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier".'

"Now, summing that up, it includes with those carriers subject to the provisions of the Interstate Commerce Act, *i. e.*, all railroad companies and express companies and sleeping-car companies, and all companies which are directly or indirectly owned or controlled by the railroads and which perform service or furnish facilities in connection with transportation service performed by the railroads, and the definition includes words descriptive of such transportation service which are taken from the provisions of the Interstate Commerce Act" (pp. 16, 17).

The next step is to the Retirement Act. There have been three such acts. The first was that of June 27, 1934 (48 Stat. 1283). It foundered on the constitutional issue—

Railroad Retirement Board v. *Alton R. Co.*, 295 U. S. 330. There the defining words in so far as material here were these:

> "The term 'carrier' includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad. * * *"

The second act was that of August 29, 1935 (49 Stat. 967). There was a companion Taxing Act (49 Stat. 974). They met no better fate.—*Railroad Retirement Board* v. *Alton R. Co.*, 16 F. Supp. 955. The defining words covering "carrier" (employer) were the same as in the first act.

The third act is the present one. It was not framed in the usual way by the draftsmen of Congress. Its terms were agreed upon by the parties—labor and management—and its text was constructed accordingly.* It is

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* Mr. George M. Harrison, testifying for the employes in support of the present Retirement Act, told the story of its inception and drafting in the following language:

"In view of that litigation and the uncertainty of the future of the legislation the President of the United States wrote a letter to the representative of the railways and also to myself in the month of December 1936 and suggested, in view of the many efforts that had been made to pass railroad retirement legislation, and the resulting legal controversies, that he would suggest that the railways and the representatives of the workers undertake to consider the subject of retirement legislation in conference and see if they could reach an agreement on retirement legislation. Then the President made available to us, should we accept his suggestions, the staff of the Railroad Retirement Board for purposes of assisting in determining the various matters that necessarily would have to be considered in the development of any legislation providing for a system of retirement benefits for railroad workers. Both the railway management and the representatives of the labor

not a statute of general railroad social insurance. It was intended to provide pensions* for railroad workers, under specific limitations. For instance, coverage is restricted to certain parties (Sec. 1 (a)). Retirement is at certain ages measured by years of service, tempered in the named instances by regard for physical disability (Sec. 2). The amount of pension is calculated under expressly designated formulas (Sec. 3). In certain cases there is a cutback. In the framework of the act two cardinal principles of life insurance are ignored—age and physical fitness. It was apparent then and is apparent now that any extension of coverage not specifically within the terms of the statute will entail a heavy backlog of actuarial liability.

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organizations accepted the President's suggestion and conferences got under way in Washington on the 7th day of January 1937. Those conferences continued with some degree of regularity, although intermittently, until the 18th day of February, at which time the representatives of the two groups reached an agreement, and that agreement resulted in the preparation of the bill which is now under consideration by your honorable committee.

* * * * * * * *

"Now, as I said in the beginning, I give you that development, because the bill now before your committee is the product of long consideration by the respective committees representing railway management and railway labor. In fact, it is an agreement between the two groups on railroad retirement legislation. So we appear in support of the bill by way of saying to the committee that the bill represents an agreement between the two parties, railway labor and railway management, the latter represented by the Association of American Railroads, representing substantially all of the railroad mileage of the country, and the former by the Railway Labor Executives' Association, embracing all of the standard railway labor unions, and representing substantially all of the approximately 1,150,000 railway workers in the United States."

(Testimony of Mr. Harrison before the Committee on Interstate and Foreign Commerce, House of Representatives, 75th Congress, 1st Session, on H. R. 6956, pp. 10-11. See also to the same effect testimony of same witness before the Committee on Interstate Commerce, United States Senate, 75th Congress, 1st Session, on S. 2395, pp. 10-11; and testimony before Committee on Ways and Means, House of Representatives, 75th Congress, 1st Session, on H. R. 6448—Carriers Taxing Act of 1937, pp. 5-6.)

*In the case of those employees who were on the pension rolls of the individual companies on July 1, 1937, the payments are called pensions. In all other cases they are called annuities. (Sec. 6.)

The companion Taxing Act provides the money for the payment of pensions. Its rates were calculated on carrying the load on what are commonly known and recognized as railroad workers. And it may not be amiss to note at this point that those rates have not proven sufficient to adequately carry that load. In other words, the Railroad Retirement Fund at the moment is actuarially insolvent. The Retirement Act, Sec. 15 (d), requires an actuarial survey to be made at intervals of not longer than three years. Two such surveys have been made. The first one found the fund inadequate. And the last one estimates that by the year 1955 there will be no reserve—Annual Report Railroad Retirement Board, 1943, p. 119.

Under these circumstances the intent can best be gathered from an examination of the testimony of the witnesses who sponsored the respective bills before the committees of the two houses of Congress. It is particularly to be noted that Mr. Harrison, one of the defendants in No. 95, but omitted as such in No. 103, represented not only labor interests but spoke also for the carriers, since the parties were in agreement.* At the beginning of his testimony before the House Committee on H. R. 6956, 75th Congress, 1st Session, the following direct question was asked and answer given:

> "MR. WOLVERTON:—Does the act consider ferry companies as a part of transportation systems?
>
> "MR. HARRISON:—If such ferry is operated by the railroad company and is a ferry which is engaged in transporting passengers and property *as a part of the railroad transaction;* yes" (p. 16). (Emphasis supplied.)

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*"MR. FLETCHER:—Mr. Chairman and gentlemen of the committee, my name is R. V. Fletcher, and I am with the Association of American Railroads.

"I am spared the task of making an extended statement by reason of the very full analysis of the bill which has been presented to the committee by Mr. Harrison, who spoke, insofar as an explanation of the bill is concerned, not only for the group which he immediately represents but for railroad management as well." (Hearings H. R. 6956, p. 82.)

Further testifying at the same hearing Mr. Harrison said this:

"Now section 1 might be referred to as the scope of the legislation. Section 1 makes the bill applicable to those that are defined in that section as employers. Now the employers defined in section 1 are express companies, sleeping-car company, or carrier by railroad that are subject to part 1 of the Interstate Commerce Act, and in addition thereto it is proposed to include as employers any company which may be directly or indirectly owned or controlled by the express company, the sleeping-car company, or railway company, or under common control by one or more of such companies, when those companies are engaged in the business of transporting passengers or property for the railroad, or other *service that is a part of railway transportation,* such as grain elevators, private car lines, refrigerator car companies, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of these previously identified employers which are, express companies, sleeping-car companies, or carriers by railroad." (Emphasis supplied.)

* * * * * * *

"Now, the language used thus far, as explained by me, is the same language, I think it could be said, that has been incorporated in the Railway Labor Act; that was incorporated in the previous railroad retirement legislation. But at that point now we expand the application of this legislation as compared to the present law.

"We include such joint associations as may be formed or operated by two or more railway companies. For example, they have joint agencies that are engaged in the collection of freight bills, used as

a clearing house, make deposits of funds that are collected. The agency is supported by the member railways. They have joint passenger agencies and ticket associations that are operated and supported by the railways. They have inspection and weighing and demurrage bureaus operated by the railroads. The railroads have joint organizations dealing with labor matters for railway management, and they have a joint association known as the Association of American Railways. All these joint agencies that are performing service which is incidental to railroad transportation and supported in whole or in part by the railroad companies are included as employers.

"We further expand the application of the proposed legislation by including the 21 standard railway labor unions that represent the employees, and we make the railway labor unions, for the purposes of the act, employers. In the international headquarters of these various labor unions we have a staff of clerks, clerical employees and officers, and they will be given the benefit of this proposed legislation in just the same manner that they would if they were working for a railroad company. The railway unions will be the employers, exactly the same way as the railroad companies will be employers". (pp. 17-18).*

*The phrascology was finally worked out in this way:

"MR. HARRISON:—I would like to offer an amendment on page 2 of the bill. Strike out lines, 3, 4, 5, 6, 7, 8, and the words '(other than trucking service)' in line 9 and insert in lieu thereof the following——

"MR. HALLECK:—That is on page 2?

"MR. HARRISON:—Yes, sir; page 2, lines 3 to 8, both inclusive, and the words in parentheses 'other than trucking service' in line 9.

"And insert in lieu thereof the following:

"(a) The term "employer means any carrier (as defined in subsection (m) of this section), and any company which may be directly or indirectly owned or controlled by one or more of such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities)'." (H. R. 6956, p. 134. Same change in Senate Report on S. 2395, p. 4.)

Before the Senate Committee on S. 2395, the same witness said this:

"Mr. Harrison:—In offering these amendments, I should like to say that the amendments have been agreed to by the railway management, by railway labor, and by the Treasury of the United States. We have inserted the amendments in the proper places, and we have enough corrected copies of the bill to distribute to five or six of the members of the committee.

"The first of these amendments is as follows: On page 2, paragraph (a), strike out lines 3, 4, 5, 6, 7, and 8, and also strike out the words 'trucking service' on line 9; and in lieu thereof, substitute the following [reading]:

"(a) The term "employer means any carrier (as defined in subsection (m) of this section) and any company which may be directly or indirectly owned or controlled by one or more of such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities).'

"The Chairman:—What is the meaning of 'casual'?

"Mr. Harrison:—Well, the railways occasionally employ a contractor to repair a depot or to build a bridge, or do some other work for them that ordinarily is carried on by the railway force. In that instance, we would not undertake to take in the force of the contractor, just because those men were doing occasional work for the railroad company.

"Senator White:—These are services that are not ordinarily performed by the railroad company or by its employees?

"Mr. Harrison:—That is true.

"THE CHAIRMAN:—Does this include busses operated by the railroads?

"MR. HARRISON:—No. If the bus is *operated by the railroad as a part of its transportation*, then the workers on the bus would come under the proposed law. However, if there is a subsidiary bus or truck company, then it is subject to part II of the Interstate Commerce Act; and this bill applies only to part I of the Interstate Commerce Act—'such common carriers as are subject to part I of the Interstate Commerce Act.' and they are—

> 'any express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act, and any company which may be directly or indirectly owned or controlled thereby or under common control therewith, and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad.'

"*In other words, part of the railroad plant*" (p. 11). (Emphasis supplied.)

This is from the same witness before the House Committee on Ways and Means on H. R. 6448, Seventy-Fifth Congress, First Session, which became the Carriers Taxing Act of 1937:

"The bill, H. R. 6448, that is now under consideration, levies an excise tax on certain employers and those employers are defined in section 1 of the bill.

"Briefly, they are all common carriers by railroad subject to the Interstate Commerce Act; express

companies that are subject to title I of the Interstate Commerce Act, and such other companies as are directly owned or controlled by the railway companies and engaged in the business of transporting passengers or property. In addition thereto the national rail labor unions.

"MR. CULLEN:—That would relate to bus companies, too, would it not?

"MR. HARRISON:—No. They are not subject to part I of the Interstate Commerce Act. They are subject to part II.

"MR. CULLEN:—Do not some of the railroads own bus lines that carry passengers?

"MR. HARRISON:—Railroads own them, you say? No; they are subsidiary corporations and they are regulated by title II of the Interstate Commerce Act.

"MR. KENT:—Is it not any company that is directly or indirectly owned or controlled?

"MR. HARRISON:—Directly owned by the railway companies, and *the company must be engaged in the business of transporting passengers or property.* In addition, it includes the national railway labor unions as employers" (p. 6). (Emphasis supplied.)

This is from the testimony of Mr. Latimer, Chairman of the Retirement Board, with respect to the Taxing bill, 6448:

"MR. TREADWAY:—Are not a good many bus lines controlled or owned by the railroads?

"MR. LATIMER:—Yes; they are.

"MR. TREADWAY:—Would you make them come under the general provisions of this bill?

"MR. LATIMER:—Not if they are not performing service in the transportation of passengers and property of the railroads. They must be an integral part of railroad operation" (p. 39).

And this is important from Mr. Hay, counsel for the labor interests, in testifying before the Senate Committee on S. 2395:

"SENATOR BARKLEY:—As a matter of fact, this act will only apply to those included in its terms, and they are limited by definition?

"MR. HAY:—Yes.

"SENATOR BARKLEY:—I do not really see the necessity for any amendment.

"MR. HAY:—Frankly, I had some question as to the necessity of it, but since there was a question raised by gentlemen whom we look upon as having sound judgment, I did not want any question to remain——

"SENATOR BARKLEY:—Is there any real need for the language in lines 15 and 16 'as the word "employer" is hereinbefore defined'?

"MR. HAY:—Yes. That phrase, 'as the word "employer" is hereinbefore defined', runs all through this bill. You will find it in section 1 (a).

"SENATOR BARKLEY:—Yes; but the definition of 'employer' is given, and wherever the word 'employer' appears in the bill it would relate back to the definition. I am wondering whether it is necessary to say there 'as the word "employer" is hereinbefore defined.' By defining it you make it apply wherever the use of it appears in the bill.

"MR. HAY:—Senator, in a few places in the bill the word 'employer' by express language is given a broader meaning than the definition in section 1 (a). In order to be certain that it is limited to the employers that we are really covering by the bill, the limitation is written in". (p. 35).*

* Instances are found in Sec. 1 (f) and Sec. 2 (a) of the Act. And this same restrictive language is found in Sec. 1 (a) (b), and similar restrictive language appears in Sec. 6 (a).

The Railroad Retirement Board has sought to belittle the testimony here quoted with respect to the Railway Labor Act, Retirement Act and Taxing Act, asserting that the statements of the sponsoring witnesses are (1) "equivocal", and (2) "that they represent no more than the hypothetical opinions of committee witnesses, derived by inference from testimony susceptible of conflicting inferences" (R. 40). That, of course, is plainly untrue. This phase of the case was brought forcibly to the attention of the lower Appellate Courts, both in brief and on argument. But in No. 103 that court gave it insufficient attention and said, "Individual opinion of witnesses at a hearing is of doubtful value in the interpretation of an act," (No. 103, R. 86) and for that statement relied upon *McCaughn* v. *Hershey Chocolate Co.* 283 U. S. 488, 493-4. But that case is as far distant from the situation here presented as the statement of the court is incorrect when applied to this case. The sentence relied on there is this: "Nor do we think of significance the fact relied upon here and by the court below that statements inconsistent with the conclusion which we reach were made to committees of Congress or in discussions on the floor of the Senate by senators who were not in charge of the bill. * * * " What we have here are direct statements from witnesses in charge of the bills before the committees. And in such instances it has strikingly been brought to the attention of those who practice before this Court how often this Court and the lower federal courts, particularly in recent cases, have resorted to those hearings for the purpose of assistance in gathering the meaning and intent of statutes. Some examples are these: *Interstate Commerce Commission* v. *Parker*, U. S. (June 18, 1945); *Southern Pacific Co.* v. *Arizona*, U. S. (June 18, 1945); *Elgin, Joliet and Eastern Ry. Co.* v. *G. W. Burley*, U. S. (June 11, 1945); *The Western Union Telegraph Co.* v. *Lenroot*, U. S. (Jan. 8, 1945); *Korematsu* v. *United States*, U. S.

(Dec. 18, 1944); *Exparte Mitsuye Endo*, U. S. (Dec. 18, 1944); *Claridge Apartments Co.* v. *Commissioner of Internal Revenue*, U. S. (Dec. 4, 1944); *McDonald* v. *Commissioner of Internal Revenue*, U. S. (Nov. 20, 1944); *Carolene Products Co.* v. *United States*, U. S. (Nov. 6, 1944); *Federal Security Adm'r* v. *Quaker Oats Co.*, 318 U. S. 218; *United States of America* v. *Bethlehem Steel Corporation*, 315 U. S. 289, 304; *United States* v. *Madigan*, 300 U. S. 500, 505; *United States* v. *Missouri Pacific Railroad Co.*, 278 U. S. 269, 279; *Holy Trinity Church* v. *United States*, 143 U. S. 457, 464; *Petition of Bone*, 19 F. Supp. 219, 222; *Securities & Exchange Commission* v. *Robert Collier & Co.*, 76 F. (2d) 939, 940; *Smith* v. *Gilliam*, 282 Fed. 628, 636; *Coke* v. *Illinois Central Railroad Co.*, 255 Fed. 190, 194. And see *Tap Line Cases*, 234 U. S. 1, 27.

From a review of the foregoing testimony it is submitted that these conclusions result:

1. The parties intended to be covered by the Unemployment Act are the same as those covered by the Retirement Act.

2. The history of the Retirement Act includes that of the Railway Labor Act. That Act was intended to cover only those parties performing part of what is well known as railroad transportation itself. As was said by Mr. Eastman, it was not intended to go beyond carriers and their subsidiaries engaged in that transportation. One of the reasons for this was because of the possible conflict with other industries which were covered by the National Industrial Recovery Codes. And Duquesne during the life of the National Industrial Recovery Act was under such a code (R. 185).

3. As to the Retirement Act itself, and bearing in mind that its terms are the embodiment of an agreement

between management and labor, the coverage was intended to include only the following:

(1) Carriers subject to Part I of the Interstate Commerce Act and their employes.

(2) Associations, bureaus and agencies controlled and maintained wholly or principally by two or more employers and which perform services in connection with or incidental to railroad transportation, such as consolidated ticket offices and demurrage bureaus whose employes are admittedly in railroad service.

(3) Companies directly or indirectly owned or controlled by one or more such carriers and engaged in "service that is a part of railway transportation" (Harrison, *supra*, p. 35); "operated by the railroad as a part of its transportation," or "in other words part of the railroad plant" (Harrison, *supra*, p. 38).

(4) Those labor organizations directly subject to the Railway Labor Act.*

V. The Retirement And Unemployment Insurance Acts Relate To The Railroad Industry And It Was Never Intended That Their Coverage Should Extend To The Warehouse Industry.

This phase of the case is best brought out in the hearings before the Senate and House Committees on the bills which became the Unemployment Insurance Act:

> "To state the purpose of the bill in a sentence, it is this: It is to do for the railroad industry with respect to unemployment compensation what the Railroad Retirement Act does for that industry with respect to old-age benefits; that is to say, to set up a separate system applicable only to the railroad industry.

* "SENATOR SMITH:—You just include those members of these different organizations who are directly connected with the railroads?

"MR. HARRISON:—With the railroad industry." (Senate hearings on S. 2395, p. 19. (Retirement Act).)

"THE CHAIRMAN:—That is, you want to take it out of the general law?

"MR. HAY:—We want to lift it out of the general social security system and apply this system to the railroad industry alone."

(Hay, Senate Hearings, S. 3772, June 3, 1938, p. 25.)

"Our association has had two principal objectives in this matter. We want a plan of unemployment insurance that any railroad worker can understand. We want a plan of unemployment insurance that is practical for railroad workers, that fits their needs and the conditions of their employment. I have already said that the passage of this bill will mean a landmark in the history of social-security legislation in the United States, because we know that all our members will clearly understand their rights under it. I want now to emphasize our second purpose."

(Cashen, House Hearings, H. R. 10127, May 26, 1938, p. 23.)

And it is emphasized by Mr. Reed, Member, Railroad Retirement Board, in his dissenting opinion, from which we quote the following:

"The lines of demarcation as to industry and its extent in this country have been closely defined. In these later times this has been because of the labor situation. For instance, there is a steel industry and a copper industry, and like industries in other metals, such as lead and zinc. Each is separate nd distinct. Also there is a clothing industry. And separate and apart from that, there is a cleaning industry. While there are many workers engaged in the cleaning industry who perform work on clothing, yet no one would contend that the cleaning industry

is the clothing industry or a part of it. Similarly, there is a fishing industry and a canning industry. And yet no one would contend that the canning of salmon is a part of the fishing industry. Further, there is a railroad industry for those employed in the railroad transportation. And there is a warehouse industry for the commercial storage and handling of goods.* Further, there is a shipping industry for transportation by water, and yet no one would assert that the shipbuilding industry is a part of that shipping industry.'" (No. 103, R. 53-4.)

This line of cleavage is expressed as follows in the case of *Allen* v. *Ocean S. S. Co. of Savannah, supra*:

"It is quite apparent that the construction appellant contends for will result in cutting across industrial lines and in absorbing into the special railroad insurance system, some part of other industries because those parts happen to be owned by railroads, while that for which appellee contends, will have no such effect. That consideration alone should, we think, give us pause in construing, indeed should prevent our construing the act as appellant does, unless its language does not reasonably admit of any other result." (P. 471.)

VI. The Words "In Connection with" as Used in These Acts Are not Appropriate or Applicable to the Services Performed by Duquesne. This Has Been Ruled by the Retirement Board Itself, and Has Been so Determined by the Courts and the Interstate Commerce Commission in Numerous Cases.

In order to bring Duquesne within the coverage of the Railroad Retirement and Railroad Unemployment In-

* Investigation discloses that the storage and moving of household effects is still another branch.

surance Acts, it must not only be owned by a carrier, as it is, but must also "perform service * * * in connection with the * * * storage * * * of property transported by railroad." As already pointed out, this language, *supra*, page 30, according to the testimony of Commissioner Eastman, was borrowed from the definition of "transportation" as used in the Interstate Commerce Act, viz., "all services in connection with the receipt, delivery, elevation and transfer in transit, ventilation, refrigeration or icing, storage and handling of property transported."

In other words, to bring Duquesne within the coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts, it must perform that kind of storage in connection with the transportation of property by railroad, which is defined by the Interstate Commerce Act as forming a part of transporation service. This is in line with Mr. George Harrison's testimony that the Retirement Act applies only to railroad subsidiaries which are "engaged in service that is a part of railroad transportation," or "operated by the railroad as part of its transportation," when read together with the Senate Committee's statement that the Unemployment Insurance Act has the same coverage as the Retirement Act.

The main question in this case is, therefore, whether the storage service performed by Duquesne, irrespective of its ownership, is the kind of storage which amounts to a transportation service. In other words, if Duquesne were not railroad-owned, would its storage service be "in connection with transportation by railroad" in such sense as to amount to railroad transportation service?

The Record (R. 178-9) shows that there is another warehouse company at Pittsburgh, also located on the line of the Pennsylvania, and which has a private siding from the Railroad to its warehouse. Sugar is received and handled by that warehouse company from a large eastern refiner in precisely the same manner as sugar is

received and handled from another refiner by Duquesne at East Liberty. It arrives in car lots. After delivery by the railroad on siding, it is unloaded by that warehouse company, handled by the warehouse company, and subsequently distributed by it under direction of the owner. The services performed by it are precisely those performed by Duquesne. It has never been asserted that the services of that warehouse company are services "in connection with transportation by railroad" in the sense of transportation services.

There is an obvious common-sense distinction between general commercial storage or warehousing, even though the articles may have received a prior movement by rail or are intended to receive a subsequent movement by rail, and railroad storage proper in the sense of storage of property received by a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation. Clearly it is along the line of this common-sense distinction that the boundary was intended to run between warehousing covered by the Railroad Retirement and Unemployment Insurance Acts and warehousing not so covered. This was at one time emphasized and insisted upon by the Railroad Retirement Board itself.

Under the Retirement Act, Section 10 (b) 4, and the Unemployment Act, Section 10 (c), the Board is required to make an annual report to the President of the United States for submission to Congress. As so required it made such a report for the fiscal year ending June 30, 1938, covering both Acts. It is obviously of the highest importance that in that report, in speaking of the precise question of coverage here in issue, the Board said:

> "Storage of property received for a carrier and awaiting transportation by the carrier, or awaiting delivery by the carrier following transportation, is an employer service, *but performance of the usual commercial storage and warehousing business is not.*" (P. 142.) (Emphasis supplied.)

This is in accord with Mr. George M. Harrison's testimony, quoted above, p. 38, in which he identified the warehousing covered by the Acts as that which was in effect "part of the railroad plant." The Retirement Board repeated this correct and obvious construction of the coverage provisions of the Acts in a circular dated October 7, 1938, and given widespread distribution under the heading, MEMORANDUM No. U.-I.—S. 1—COVERAGE OF "EMPLOYERS", "EMPLOYES' REPRESENTATIVES", AND "EMPLOYES" UNDER THE RAILROAD RETIREMENT ACT OF 1937 AND RELATION TO COVERAGE UNDER THE RAILROAD UNEMPLOYMENT INSURANCE ACT.

The distinction between general warehousing or commercial storage on the one hand and railroad storage, or that part of storage or warehousing which is incidental to railroad transportation and is part of the transportation service on the other hand, is an obvious and well-understood distinction. It is not the obligation of a common carrier by rail to furnish general commercial storage; it is the obligation of such a carrier to supply that kind and amount of storage which, as a practical matter, is a necessary preliminary to, or consequence of, transportation. Clearly it is only storage of the latter limited kind which is defined as a transportation service in the Interstate Commerce Act; and precisely the same language is borrowed for the coverage provision of the Railroad Retirement and Railroad Unemployment Insurance Acts.

The kind of storage or warehousing which is a transportation service is the storage which arises in the course of railroad transportation, as, for instance, where goods are received by the carrier for forwarding but withheld pending receipt of shipping instructions—*Atlantic Coast Line R. R. Co.* v. *Basnight*, 111 N. C. 592. Also, where goods have reached destination but delivery is not taken within the time prescribed by the tariffs—*Cleveland, C., C. & St. L. Ry. Co.* v. *Dettlebach*, 239 U. S. 588; *Southern Railway Co.* v. *Prescott*, 240 U. S. 632. But it is not part

of the duty of the carrier to furnish commercial storage for the care of goods after the transportation has ended; and such service is not part of railroad transportation. *Turner, Dennis & Lowry Lbr. Co.* v. *C. M. & St. P. Ry. Co.*, 271 U. S. 259, 262. The following is in point from *Guaranty Claim of Central Elevator & Warehouse Co.*, 72 I. C. C. 169, 176:

> "Storage of property transported is a transportation service only to the extent that storage is necessarily incidental to transporting such property, and the term has been used in section 1 in that limited sense. As was said by the court in *State* v. *Southern Pacific Company, supra:**
>
> 'We think that the storage of goods by a railroad in its warehouses, as a matter incidental to its business as such, contemplates and looks to a rotation of storage as immediate and prompt as the railroad corporation can make it. * * * To be incidental business, the storage must be preliminary either to immediate transportation or immediate removal'."

In its determinations in the instant cases, the Retirement Board has sought to extend its jurisdiction over ordinary commercial warehousing by reliance on the words "in connection with" as used in the coverage provisions of the Railroad Retirement and Railroad Unemployment Insurance Acts. By reliance upon these words, it has sought to bring within the coverage of the Acts not merely the strictly railroad storage which is part of the transportation service, but general commercial storage of articles which have had some prior movement or are intended to have some subsequent movement by rail. The Board's thought is apparently that if an article has received, or is intended for, rail movement, then its storage is "in connection with" transportation by railroad.

* 52 La. Ann. 1822, 28 Sou. 372.

This ignores the use of the words "in connection with" in Section 1 (3) (a) of the Interstate Commerce Act. There, the storage referred to is undeniably limited to storage which is an actual part of the transportation, and yet it is described by use of the words "in connection with." These words have come to be so familiarly employed in many provisions of statutes dealing with transportation as to have acquired a clear and definite significance in transportation law. The Retirement Board has gone astray through lack of familiarity with this use of the words.

It has long been customary in transportation statutes to use the words "in connection with" as relating to some act or thing done to property in the course of, or during the progress of, or as a part of, the actual transportation. Thus, Section 15 (13) of the Interstate Commerce Act provides that, if the owner of property transported "directly or indirectly renders any service connected with such transportation," the charge and allowance therefor shall be published in filed tariffs and shall be no more than is just and reasonable. Clearly this relates to a service rendered during the course of, or as a part of, the actual transportation, and not to something done to the property before or after the transportation. Similarly, Section 1 (5) provides that charges for "any service rendered or to be rendered in the transportation of property, or in connection therewith, shall be just and reasonable." Here again the reference is obviously to a service rendered as part of the transportation. We have already seen above that in Section 1 (3) (a) the words "all services in connection with the receipt, delivery, elevation, etc., of property transported," which are defined as constituting transportation, are meant only to refer to such services when rendered in the course of, or as a part of, the actual transportation.

Accordingly it has come to be well recognized by the courts that the words "in connection with" or "connected

with" when used in relation to transportation, refer to acts or things which are a part of the transportation. Thus in construing that part of Section 15 (13) of the Commerce Act, which deals with allowances to the owner of property "who renders any service connected with such transportation" the words "connected with such transportation" were explained in *New York Central & Hudson River Railroad v. General Electric Co.*, 146 N. Y. Supp. 322 (1914), as follows:

> "* * * I understand that the defendant urges that the wording of Section 15, 'if the owner of property transported under this act directly or indirectly renders any service connected with such transportation or furnishes any instrumentality used therein,' etc., includes this service in question; that the service from which the owner may receive compensation from the carrier under this provision need not be a part of the transportation itself, but only connected with it. I conclude, however, that *the expression 'connected with' is a synonym of 'a part of it'; it does not mean something, in addition to transportation, that touches, or is attached to, transportation.* A common carrier of property cannot include in its charge for transportation an item which is not a part of transportation, and it was not intended by said provision to require the carrier to pay for a service which it was not bound as a carrier of property to render and for which it could not charge. * * *" P. 327. (Emphasis supplied.)

That case was affirmed by the Court of Appeals in 219 N. Y. 227, where reference is made in its opinion to the "careful opinion" of the trial court (p. 234). Certiorari was denied by this Court, 243 U. S. 636. And the de-

cision in the Court of Appeals was relied upon by the Interstate Commerce Commission in reaching a like conclusion in *Propriety of Operating Practices—Terminal Services*, 209 I. C. C. 11, 23. See also *Pennsylvania R. Co.* v. *M. McGirr's Sons Co.*, 287 F. 334 (1922), a Second Circuit case, certiorari denied, 262 U. S. 743; *American Sugar Refining Co.* v. *D. L. & W. R. Co.*, 200 Fed. 652, reversed in 207 Fed. 733 on other grounds, but quoted from with approval in the *McGirr* case, *supra*; *Lehigh Valley R. R. Co.* v. *United States*, 243 U. S. 444; *United States* v. *Baltimore & Ohio R. R. Co.*, 231 U. S. 274; *Uniform System of Accounts*, 171 I. C. C. 557; petition to enjoin enforcement of Commission's order dismissed, *Norfolk & Western Railway Co.* v. *United States*, 52 F. (2d) 967, affirmed 287 U. S. 134; *Pennsylvania Railroad Co.* v. *Knight*, 192 U. S. 21.

The Retirement Board in the instant cases departs completely from this uniform and established course of construction. In support of its position it cites five cases, of which the *Danciger* case, 248 U. S. 319, is typical. That case, like the others, has been misunderstood by the Board. There, the act held to be "in connection with" transportation occurred while the property was actually in the possession of the carrier and before the transportation had ended. It is, therefore, no authority for the Board's contention that something which precedes the commencement or follows the termination of the transportation may be "connected" therewith. The case involved violation of the United States Criminal Code with respect to the transportation of liquor from a point without to a point within a dry state. The collection of the purchase price before delivery of the property by the carrier and while the property was in the carrier's possession was held to be "in connection with" the transportation of the same. On this point the court said:

"To be within the statute it is essential that the act of collecting the purchase price be done 'in connection with the transportation of' the liquor. The statute does not say 'in the transportation,' but 'in connection with' it. Transportation, as this court often has said, is not completed until the shipment arrives at the point of destination and is there delivered. *Rhodes* v. *Iowa*, 170 U. S. 412, 415, 420; *Vance* v. *Vandercook Co.*, 170 U. S. 438, 451; *Louisville & Nashville R. R. Co.* v. *Cook Brewing Co.*, 223 U. S. 70, 82; *Kirmeyer* v. *Kansas*, 236 U. S. 568, 572; *Rosenberger* v. *Pacific Express Co.*, 241 U. S. 48, 50. What Cooley did, while not part of the transporation, was closely connected with it. He was at the point of destination and held the bill of lading, which carried with it control over the delivery. Conforming to his principal's instructions he required that the purchase price be paid before the bill of lading was passed to the vendee. The money was paid under that requirement and he then turned over the bill of lading. A delivery of the shipment followed and that completed the transportation. Had the carrier done what he did all would agree that the requisite connection was present. As the true test of its presence is the relation of the collection, rather than the collector, to the transportation, it would seem to be equally present here." (pp. 327-8)*.

Clearly neither this language nor the facts of the case support the Board's contention that storage which takes place after the termination or before the commencement of transportation is "in connection" therewith.

* The better reasoning in the Florida case referred to in the Board opinion (R. 32) appears in the dissenting opinion. And that was not a transportation case.

VII. On the Undisputed Facts of the Instant Cases the Services Performed by Duquesne are Subsequent to the Termination or Prior to the Commencement of the Railroad Transportation, and Are Therefore Not "in Connection with" the Transportation in Such Sense as to Fall Within the Coverage of the Railroad Retirement and Railroad Unemployment Insurance Acts.

The undisputed facts in the instant cases indicate a course of business on the part of Duquesne which is clearly ordinary commercial storage, because the storage is performed before the commencement or after the termination of railroad transportation. This is clearly the case in connection with a number of features of the storage service rendered by Duquesne which have not been properly understood by the Retirement Board and have, therefore, been improperly treated as indicating that the storage was part of the transportation. These may be considered under four headings: (*a*) delivery on private siding; (*b*) Duquesne as consignee; (*c*) loading and unloading of cars; (*d*) storage in transit.

(*a*) Delivery on Private Siding—Each of the two Duquesne warehouses has a siding of its own where carlot deliveries are made. Railroad transportation is then and there ended (R. 22, 134). In the case of less than carlot freight, delivery is made to Duquesne by Pennsylvania's agency *as in the case of any other consignee*. On outbound shipments the reverse is the case. That delivery on such a siding is the complete end of railroad transportation has long been settled law.

> "In the instant case, when the carrier placed the car containing the pulp on the siding designated in the bill of lading, it had reached its destination and the transit was at an end. The Eddy, 72 U. S. (5 Wall.) 481, 495, 18 L. Ed. 486; Convers *v.* Ennis, 6 Fed. Cas. 377, No. 3149; *In re* M. Burke & Co.

(D. C. W. D. Pa.), 140 Fed. 971, 15 Am. Bankr. Rep. 495; *In re* W. A. Paterson Co. (C. C. A. 8), 186 Fed. 629, 108 C. C. A. 493, 25 Am. Bankr. Rep. 855, 34 L. R. A. (N. S.) 31; Shepard & Morse Lumber Co. *v.* Burroughs, 62 N. J. Law 469, 41 Atl. 695; 2 Kent. Comm. pp. 706, 707; Johnson *v.* Eveleth, *supra*; Benj. on Sales (5th Ed.) pp. 906, 907; Scott *v.* Pettit, 3 B. & P. 469; Ellis *v.* Hunt, 3 T. R. (D. & E.) 464; Kendal *v.* Marshall Stevens & Co. (C. A.) 11 Q. B. D. L. R. (1882-83) 356; Sawyer *v.* Joslin, 20 Vt. 172, 49 Am. Dec. 768."

In Re Arctic Stores, 258 Fed. 688, 691.

"* * * It has been held that a railroad corporation is required to deliver cars upon such a siding provided it is within its switching area or its terminal limits, and that transportation ends when cars are placed upon the siding. New York, New Haven & Hartford Railroad *v.* Porter, 220 Mass. 547, 108 N. E. 499; Batchelder & Snyder Co. *v.* Union Freight Railroad, 259 Mass. 368, 156 N. E. 698, 54 A. L. R. 616; Los Angeles Switching Case (Interstate Commerce Comm. *v.* Atchison, T. & S. F. R. Co.), 234 U. S. 294, 34 S. Ct. 814, 58 L. Ed. 1319; United States *v.* American Sheet & Tin Plate Co., 301 U. S. 402, 57 S. Ct. 804, 81 L. Ed. 1186; Banner Grain Co. *v.* Great Northern Railway, 119 Minn. 68, 137 N. W. 161; 41 L. R. A., N. S., 678; New York Central & Hudson River Railroad *v.* General Electric Co., 219 N. Y. 227, 114 N. E. 115, 1 A. L. R. 1417; Lee *v.* Erie Railroad, 173 App. Div. 75, 158 N. Y. S. 730."

Rice & Lockwood Lumber Co. v. Boston & M. R. R., 398 Mass. 101.

(*b*) Duquesne as Consignee.—The shipments which come in via rail to Duquesne are consigned to the owners, care of Duquesne. Under that form of consignment,

delivery to Duquesne is delivery by Pennsylvania to the consignee, and railroad transportation is at that point completed.

> "Where goods are shipped to a consignee in the care of another person, that person has the right to receive the goods and he becomes the proper person to whom the carrier may make delivery. City National Bank *v.* El Paso & Northeastern Railway, 262 U. S. 695, 43 S. Ct. 640, 67 L. Ed. 1184; Commonwealth *v.* People's Express Co., 201 Mass. 564, 572, 88 N. E. 420, 131 Am. St. Rep. 416."
>
> *Philadelphia Tapestry Mills* v. *New England S. S. Co.*, 251 Mass. 270.

See also Federal Bills of Lading Act, Sec. 42, definition of "consignee".

(c) Loading and Unloading of Cars—The Retirement Board asserts that the loading and unloading of cars by Duquesne is "in connection with railroad transportation", and that these services are "important elements of railroad transportation" (R. 27, 30). This is but another instance of the gross fallacy on which the whole case of the Board rests. The unloading and loading is done by Duquesne for its customers. The Board specifically so finds (Findings 5 and 6, R. 21-3). These services are before railroad transportation has begun or after it has ended. The facts so say (R. 134). The tariff of the railroad company forbids its performing the services (R. 135). Under such circumstances loading and unloading is not and cannot be a part of railroad transportation.

> "Transportation includes delivery. Under the plaintiff's published tariffs it does not include the work of loading and unloading. Official Classification, 38, Interstate Commerce Commission. * * *"
>
> *New York Central & H. R. R. Co.* v. *General Electric Co.*, 219 N. Y., 227, 234.

See also *Louisville Cement Co.* v. *United States*, 19 F. Supp. 910, 916, and *Pennsylvania Railroad Company* v. *Kittanning Iron & Steel Manufacturing Company*, 253 U. S. 319, 323.

(*d*) STORAGE IN TRANSIT—This term is a misnomer. It is in fact storage *out of transit*. It means that when carload freight of named commodities is shipped into designated points over a named railroad, and then taken out of railroad transportation for storage purposes and subsequently reshipped over the line of the same railroad, that freight in carload lots is entitled to the through rate to ultimate destination instead of the combination of locals into and out of the transit point. It has no application whatever to the warehouse. It does not affect its charges. It affects the railroad charges only—*Central R. R. Co. of N. J.* v. *United States*, 257 U. S. 247. Railroad transportation has ended when the property is delivered to the warehouse.

"The contention that the Santa Fe's canceled tariff was legally part of a through rate is also unsound. The argument rests upon a fiction—the fiction of a through rate with transit privilege. As applied here, the fiction is inconsistent with every fact of legal significance. When grain is shipped from a country point to a primary market, its ultimate disposition is rarely known. Who the owner of the grain will be when it reaches the primary market is uncertain. It may be sold en route before arrival there. While stored there, it may be resold several times. Some of it may be consumed in local flour mills. Most of that stored in local elevators will probably be shipped out. But until the grain is shipped out it will not be known to what place, or even in what direction, or by what railroad, it will be carried. Southern Kansas Grain Ass'n *v.* Chicago, Rock Island & Pacific Ry. Co., 139 I. C. C. 641, 666.

> The treatment of substantially all grain coming from the country point is this. The bill of lading is for a shipment from the country point to the primary market. There is nothing in any of the papers connected with that transportation to indicate that the grain has a destination beyond the primary market. Upon arrival there, the owner requires delivery to be made at such elevator or other place as he selects. The freight charges are paid: the amount being the full local rate for transportation from the country point to the primary market. The car is then released; and the movement called inbound ends."
>
> *Atchison, T. & S. F. Ry. Co.* v. *United States*, 279 U. S. 768, 777-8.

See also *F. H. Peavey & Co.* v. *Union Pacific R. Co.*, 176 Fed. 409, 419.

The facts show that at East Liberty this transit privilege is not limited to sugar but applies also to canned foodstuffs. And the privilege is not local to Pittsburgh but applies at other points on other products, and is available to any shipper of the named commodities at the named points (R. 136).

The tariff of the railroad company under which the privilege is offered to shippers contains this pertinent provision:

> "While the shipments are stored in transit under these rules their custody and possession as between carrier and the consignee or owner, shall be that of the consignee or owner."

This Court has sustained a holding that such services are not a part of railroad transportation:

> "The Commission found that the in-transit warehousing was not a part of transportation. . . .
>
> . . . . . .
>
> "We accept this conclusion. . . ."
>
> *Baltimore & O. R. Co.* v. *United States*, 305 U. S. 507, 525-6.

VIII. Answers To Certain Specific Points Raised By Retirement Board.

A. WAREHOUSING.—It is claimed by the Retirement Board that its ruling in these cases follows from its decision in the case of the *Baltimore Fidelity Warehouse Company*, R. R. B. Law Bulletin No. 2, p. 532 (R. 26). But in that case it affirmatively appeared that the ~~railroad~~ warehouse company was performing services in connection with the transportation of property by railroad. We have no quarrel with such a decision except to say that it is not in point here. And this is from the Board's own opinion in that case:

> "In addition to storing goods transported by the Railway Company the Warehouse Company acts as freight agent for the Railway Company at three of its stations in Baltimore, the York Street Station, Brown's Wharf and Fidelity Station" (p. 534).

B. HANDLING OF REFUSED AND DAMAGED FREIGHT.—The facts are these:

> "* * * The warehouse company also at the warehouse receives from the railroad company freight which has been damaged and refused. At that time the warehouse company takes entire possession of the freight, reconditions it, and sells it at private sale. In case the freight proves to be worthless, the warehouse company disposes of it. For these services the warehouse company charges the railroad company 10% of the gross proceeds of sale, with deductions for any necessary expenses in reconditioning and handling, and remits the balance to the railroad company. *This is after the freight has finished its transportation and is turned over to the warehouse company for disposal by the railroad company in a separate and independent transaction*" (R. 137). (Italics supplied.)

In the handling of this freight Duquesne has never delivered any of it to the consignee or owner; nor has

Duquesne under any direction of Pennsylvania ever disposed of any of such freight which has become so worthless as to be unsalable (R. 178). And since the record concedes that the services in question are performed after railroad transportation has ceased, it does not appear how they could be "in connection with" it.

C. THE FACT THAT THE PRINCIPAL OFFICERS OF DUQUESNE ARE ALSO CORPORATE OFFICERS OF THE PENNSYLVANIA DOES NOT MAKE DUQUESNE EITHER AN AGENT OF PENNSYLVANIA OR ONE OF THE DEPARTMENTS OF THAT RAILROAD COMPANY. The statute itself recognizes the existence of the affiliate. The test is the nature of the services which Duquesne performs. The Retirement Board so admits (R. 31). Nor is there anything in this record to show dominance by Pennsylvania of policy or operation by Duquesne. As to that the District Court in No. 95 said:

> "* * * Duquesne has always conducted itself as a separate distinct corporate entity. Duquesne's employees perform services solely for Duquesne and there is no interweaving of the services of the employees of Duquesne and those of Pennsylvania; they are on entirely different payrolls. Duquesne's employees are and have been recognized solely as employees of a warehouse and hence have never been granted the privileges that Pennsylvania's employees may have had. Duquesne was recognized as a member of the Warehouse Industry under the N. R. A. Code. Duquesne was recognized and paid accordingly, as a member of the General Social Security Plan and not as a member of the Special Railroad Security System * * *" (pp. 91-2).

This phase of the case is so well expressed by the Interstate Commerce Commission in *Portland Traction Company*, 237 I. C. C. 647, 650, that we venture to present to the Court that language:

"The Board and the employees urge that the Traction Company is a part of the Electric Company and point out the ownership of the former by the latter, the fact that the two companies have the same officials, the joint use of the tracks and shop facilities, and other matters already herein discussed. None of those, however, are convincing that the Traction Company performs any transportation services more than those ordinarily performed by a street, suburban, or interurban railway. The ownership of a street suburban or interurban railway by a commercial railroad or the use of some of the latter's tracks and shop facilities by the former does not make it more than a street, suburban, or interurban railway. Where there are two separate operating entities, as are here involved, their operations must be considered separately and their status determined by the transportation service performed by each. The evidence shows that the Traction Company is not, and since August 29, 1935, has not been, more than a street, interurban, or suburban electric railway within the meaning of the exemption provisions here considered, and that it is not a part of the general steam-railroad system of transportation."

CONCLUSION.

Duquesne submits that from the foregoing argument it has been shown that:

1. Since the facts are not in dispute, the question before the Court is one of law, and the Court is at liberty to reach its own determination.

2. The two warehouses operated by Duquesne are not facilities of the Pennsylvania, nor are the services which have been and are being performed by Duquesne in connection with the transportation of property by railroad

or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad, as required by the statute.

3. The findings of the Retirement Board that the facilities operated by Duquesne and the services performed by it are in connection with the transportation of property by railroad, or the receipt, delivery, transfer in transit, storage, or handling of property transported by railroad are totally unsupported by any evidence and are entirely arbitrary and capricious.

4. The findings and opinion of the Retirement Board and the opinion of the Court of Appeals for the District of Columbia are grounded on a misapprehension of law, and are contrary to the correct interpretation and application of the statutes involved.

5. The determination of the questions at issue by the United States District Court for the Southern District of New York and the Circuit Court of Appeals for the Second Circuit was correct, and the judgment of the latter court should be affirmed.

6. The judgment of the United States Court of Appeals for the District of Columbia should be reversed, and that of the District Court of the United States for the District of Columbia should be affirmed.

Respectfully submitted,

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OCTOBER 15, 1945.

APPENDIX.

Italicized findings of fact of the Railroad Retirement Board excepted to by Duquesne as not supported by any evidence, contrary to the evidence in the record, or immaterial on any proper construction of the statutes.

1. Duquesne was incorporated on August 1, 1906, under the laws of the State of Pennsylvania. Since Duquesne's incorporation, it has been directly and completely owned *and controlled,* through stock ownership, by the Pennsylvania Railroad Company, herein called Pennsylvania, a carrier by railroad subject to Part I of the Interstate Commerce Act (R. 20).

3. *Duquesne's operations are now and have been at least since August 28, 1935, intimately and integrally related to Pennsylvania's railroad transportation.* Duquesne has been primarily, principally and predominantly engaged in the storage, loading and unloading, and other handling of goods transported over the lines of Pennsylvania, *being in substance an agency of Pennsylvania for such purposes* (R. 21).

4. *The two warehouses operated by Duquesne—one in Pittsburgh proper and the other at East Liberty in Pittsburgh—have been valuable links in the chain of Pennsylvania's railroad transportation.* They are owned by Pennsylvania and are operated by Duquesne under lease from Pennsylvania. A portion of the ground floor of each warehouse is retained by Pennsylvania and used and officially designated by it as its "freight agency." Duquesne's warehouses, as well as Pennsylvania's "freight agencies," are served by Pennsylvania's railroad tracks and are equipped with platforms or sidings and other facilities for the receipt, delivery, and other handling of inbound and outbound freight (R.21).

8. *Duquesne's position as an agency of Pennsylvania, available to provide such facilities and services as the latter requires, appears further from Duquesne's handling, reconditioning, and selling for Pennsylvania, over freight, damaged, refused freight, and damaged unclaimed freight under a contract originally entered into between the two companies on February 1, 1922, and superseded by a contract dated January 2, 1941.* Pennsylvania transports to Pittsburgh any freight it desires to be disposed of by Duquesne and Duquesne removes such freight to its warehouse after the payment to Pennsylvania of all freight and other charges that may have accrued thereon. Out of the gross proceeds realized by it from each sale, Duquesne deducts a commission of 10 per cent and any amounts paid by it for reconditioning, drayage, freight, and other charges, and turns the balance over to Pennsylvania. In the event that the gross proceeds of the sale of freight do not equal the expenses incurred by Duquesne, plus the 10 per cent commission, Duquesne is credited with the difference. When any freight is returned by Duquesne to Pennsylvania upon the latter's order, Duquesne is reimbursed only for the actual expenses incurred by it plus storage charges. Under the original contract, if any lot of freight became so worthless as to be unsalable, Duquesne was required to dispose of it as directed by Pennsylvania. Under the new contract, Duquesne is given authority to dispose of such goods as it sees fit. The original contract also provided that if the owner of any unclaimed freight is ascertained prior to the sale of such freight, Duquesne was to deliver such freight, upon instructions from Pennsylvania, to the owner, and was to receive from the owner such charges as Duquesne has paid to Pennsylvania. The new contract provides that under such circumstances Duquesne shall, upon Pennsylvania's request, return such freight to Pennsylvania upon the payment of all charges thereon which Duquesne shall have paid to Pennsylvania (R. 23-4).

9. Duquesne's revenues for the years 1936 through 1938 *show the substantial extent to which it has been engaged in functions and activities connected with Pennsylvania's railroad transportation:*

	Storage and handling of freight under storage-in-transit privileges	Storage and handling of other freight (including freight coming in or going out, or both, over Pennsylvania's rails)	Sale of damaged merchandise	Subleasing of space to manufacturing concerns
1936	$ 59,570.40	$ 63,011.60	$ 8,599.00	$32,732.00
1937	30,239.93	91,545.99	11,409.00	24,967.00
1938	29,836.01	73,702.99	8,881.86	16,035.17
	$119,646.34	$228,260.58	$28,889.86	$73,734.17

(R. 24)

13. *Duquesne's operations are, and have been at least since August 28, 1935, directly related, functionally and economically, to the performance of the transportation obligations which Pennsylvania has undertaken as a common carrier by railroad, and to the receipt, delivery, transfer in transit, storage, and handling of property transported by Pennsylvania by railroad* (R. 25).

14. *Duquesne is, and has been at least since August 28, 1935, engaged in the non-casual operation of equipment and facilities and the performance of non-casual service in connection with Pennsylvania's transportation of property by railroad, other than trucking service, and the receipt, delivery, transfer in transit, storage and handling of property transported by Pennsylvania by railroad* (R. 25).